

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>KIM DALE</b>	)	
Claimant	)	
V.	)	
	)	Docket Nos. 1,051,048
<b>HAWKER BEECHCRAFT CORPORATION</b>	)	1,060,057
Self-Insured Respondent	)	

**ORDER**

Respondent requested review of the September 18, 2015, Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on January 21, 2016.

**APPEARANCES**

Kim Dale, of Wichita, Kansas, appeared Pro Se. Terry J. Torline, of Wichita, Kansas, appeared for self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ awarded claimant a 15 percent impairment to the left arm for carpal tunnel syndrome and left medial epicondylitis based on the opinion of Dr. Bieri in Docket No. 1,051,048. No compensation was awarded in Docket No. 1,060,057, as the ALJ determined the claim was a duplicate to Docket No. 1,051,048.

Respondent appeals, arguing claimant sustained no additional impairment associated with this injury. Therefore, the Award should be reversed.

Claimant alleges injury to her left hand and arm, both shoulders and her neck and contends respondent neglected her claims before and after her termination. Claimant asks for medical treatment for her injuries and 20 million dollars.

Issues on appeal are:

1. Was claimant's recurrent left carpal tunnel syndrome the direct and natural consequence of her 2005 carpal tunnel injury and surgery?
2. What is the nature and extent of claimant's left carpal tunnel injury, including the amount of her preexisting impairment, if any?
3. Did claimant sustain her burden of establishing the need for future medical care?

#### **FINDINGS OF FACT**

In 2006, claimant was given a 9 percent whole body impairment rating for bilateral carpal tunnel syndrome by Pedro A. Murati, M.D., and was awarded compensation in an Agreed Award in Docket No. 1,021,790. Claimant continued to work for respondent with restrictions, in a different job.

In 2009, claimant developed pain in both hands, elbows, neck and shoulders. Claimant contends her pain arose out of and in the course of performing her work duties for respondent. Claimant testified she used rivet guns and a small hand tool called a mini-me, and her job required that she kneel on her hands and knees and bend her neck and shoulder to reach the area where she was required to work with the tools.

Claimant first noticed symptoms, while at work, in October 2009. She reported the symptoms a month later, when it became worse. She testified:

. . . I basically reported it it was doing a tremendous amount of -- causing a tremendous amount of pain with my hands and my elbows as far as my neck being in the awkwardness of bending down and as versus using this awkward tool that was not normally used as versus the normal repetitive work in working as a mechanic.<sup>1</sup>

Claimant testified that not only was she working in awkward positions, she was working at a fast pace. She reported her pain in November to respondent's on-site First Aid and was scheduled to see the company doctor, Dr. McMaster, and was given ibuprofen and a hand/wrist splint or support for both hands. Claimant was also instructed to check in with her family physician, Hai Truong, D.O., if her symptoms continued. When claimant met with Dr. Truong, she was told her symptoms were not arthritis. She was also referred to Dr. Salone.

After visiting First Aid, claimant returned to work, but continued to get worse as she attempted to work through her pain. Claimant testified she was working in a hurry because the line was behind.

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<sup>1</sup> R.H. Trans. at 13.

Pat D. Do, M.D., a board certified orthopedic surgeon, treated claimant in 2005, performing bilateral carpal tunnel releases. His medical records on claimant do not indicate continuing complaints or permanent impairment stemming from this course of treatment. In fact, Dr. Do was impressed with the lack of a lot of scar tissue in claimant's wrist. He testified that the tissue looked almost like the tissue claimant was born with. It was as though claimant had never been operated on.

Dr. Do next met with claimant on October 7, 2010, with followup examinations on November 19, and December 3, 2010. Dr. Do acknowledged claimant did not include neck or left shoulder complaints during the times he met with her in 2010. He recommended an EMG/NCT, which revealed mild left median neuropathy at the wrist. Dr. Do diagnosed epicondylitis at the elbow and nerve compression at the wrist.

Claimant received physical therapy and cortisone injections, which did not help. Dr. Do then proceeded with a left medial epicondyle release and left carpal tunnel release on December 10, 2010. Dr. Do acknowledged that scar tissue is a direct and natural consequence of the healing process from surgery. He testified that the ligaments that are cut during carpal tunnel surgery grow back together and sometimes grow into scar tissue. Dr. Do indicated the consequence of claimant's 2010 surgery for recurrent carpal tunnel syndrome was constriction in the area of the median nerve at the left wrist, which could be related to the 2005 carpal tunnel surgery he performed on claimant. While Dr. Do acknowledged the creation of scar tissue is a known development with the recurrence of carpal tunnel syndrome, he did not testify within a reasonable degree of medical certainty or probability that this is what happened in this instance with claimant.

When Dr. Do met with claimant on January 20, 2011, he suggested claimant undergo physical therapy. At her first therapy visit on February 2, 2011, a negative straining test of the cervical spine was performed to create provocative maneuvers in the neck that reproduce numbness and tingling in the fingers. A nerve conduction test showed no cervical radiculopathy. There was no mention in the therapy notes of neck or left shoulder complaints by claimant.

Dr. Do next saw claimant on March 1, 2011, again without complaints involving claimant's neck or left shoulder. Dr. Do released claimant from his care on March 15, 2011, without permanent restrictions.

Dr. Do acknowledged the recurrent carpal tunnel was contributed to, at least in a small part, by the 2005 surgery and the development of scar tissue after that surgery. Dr. Do testified that numbness in the hand has multiple reasons, one being a compressed nerve in the neck, and the others being a compressed nerve in the shoulder, elbow or wrist. In this instance, Dr. Do determined that, whether claimant had the surgery in 2005 or not, claimant's symptoms could have developed just as easily with her current work. Dr. Do provided no permanent impairment rating for claimant's left upper extremity.

At the time of the regular hearing, claimant was performing light duty work for Spirit as a contractor. She was not considered an employee of Spirit, but was performing work on a temporary basis. Her duties included taking out parts and putting them on a shelf, and occasionally drilling three holes on a unit. The material is very light and there is less strain on claimant.

Claimant testified currently that standing for long periods of time or sitting for long periods of time cause her pain, she has continued problems with her neck and shoulders and, occasionally, her right hand falls asleep. Her left hand tends to tense up, causing tingling in her fingers. Claimant has good and bad days in regard to her neck and shoulders.

Claimant met with board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination at the request of her former attorney, Joni Franklin, on May 2, 2011. Claimant's complaints at the time were occasional left hand ache more than right; occasional neck pain; occasional tightness in the left elbow; occasional numbness and tingling in both hands; tightness in both shoulders and neck with occasional pain; loss of strength in both hands and difficulty opening things with both hands.

Dr. Murati previously met with claimant on December 12, 2005, regarding an August 2003 work injury. At that time claimant was diagnosed with status post right carpal tunnel release, for which she was at maximum medical improvement (MMI), and left carpal tunnel syndrome. Dr. Murati assigned claimant a 12 percent whole person impairment for those injuries.

At the 2011 visit, due to claimant's current complaints, Dr. Murati referred claimant for a nerve conduction study of both wrists and an arthritis panel. Claimant was diagnosed with status post left medial epicondyle release, status post left carpal tunnel release and myofascial pain syndrome of the left shoulder girdle, extending into the cervical paraspinals. Dr. Murati indicated that claimant's grip strength improved from 2005 to 2011. He opined the diagnoses were within all reasonable degree of medical probability a direct result of claimant's work-related injuries on October 7, 2009, and each and every working day thereafter.

Dr. Murati assigned permanent restrictions of: no climbing ladders; no crawling; no heavy grasping more than 40 kg with the left; no above chest level or shoulder work with the left; no lifting, carrying, pushing or pulling more than 35 pounds, occasionally 35 pounds and frequently 20 pounds; occasional repetitive grasping or grabbing with the left; frequent repetitive hand controls with the left; no work more than 24 inches from the body with the left; no use of hooks or knives with the left; and no use of vibratory tools with the left.

Dr. Murati assigned the following impairment ratings: for left carpal tunnel release, 11 percent to the left upper extremity; for status post left medial epicondyle release, 5

percent to the left upper extremity; for creptius of the left wrist, 6 percent to the left upper extremity; for loss of range of motion of the left shoulder, 3 percent to the left upper extremity. These impairments combine for a 13 percent impairment to the body as a whole. For the myofascial pain syndrome, Dr. Murati assigned a 5 percent whole person impairment. The whole body impairments combine for a 17 percent whole person impairment.

When asked how one would develop impairment to the upper extremities, Dr. Murati testified it is essentially an overuse injury of the shoulder and neck muscles from favoring the arms, especially the hand and elbow.

Dr. Murati acknowledged that as far as he knew, claimant had not received any treatment for either her neck or shoulder prior to seeing him. He indicated that, in claimant's case, the neck symptoms developed from overuse over time.

Claimant was referred by the ALJ to board certified disability evaluating physician Peter V. Bieri, M.D., for a court-ordered independent medical examination (IME) on November 14, 2011. Dr. Bieri noted claimant's records reflect she began to have pain, numbness and tingling more on the left arm than the right, in early 2010. He noted claimant was eventually referred to Dr. Salone. When claimant did not show any improvement, she was referred back to Dr. Do, who had performed surgery on claimant in 2005.

Dr. Bieri examined claimant and noted she continued to have pain, numbness and tingling in the left hand and left wrist and pain in the left elbow. Claimant also had occasional radiation of pain into her shoulder and neck. Claimant's symptoms increased with repetitive gripping and grasping. Symptomatology on the right depended on the level of activity. Claimant had slight tenderness to diffuse palpation of the cervical spine, more so on the left than right. Range of motion was full and unrestricted. There was no significant tenderness to palpation in the shoulders and range of motion was full and unrestricted.

Claimant had slight to moderate tenderness to palpation in the left upper extremity, with Phalen's and Tinel's testing indeterminate at the level of the wrist and elbow secondary to discomfort. Claimant had some subjective sensory loss in the thumb and first two digits on the left. The elbow and wrist had full and unrestricted range of motion. There was slight and subjective tenderness involving the entire right forearm. Claimant's ability to perform fine and repetitive gross motor movements was relatively unimpaired.

Dr. Bieri opined claimant's injury occurred during the course of active employment as the result of repetitive activity reported November 1, 2009. He wrote that such injury primarily involved the left upper extremity with a diagnosis consistent with recurrent carpal tunnel syndrome at the left wrist, left medial epicondylitis and overuse syndrome on the right. He found that with the treatment claimant has received, claimant has been left with residual symptomatology.

Dr. Bieri found claimant to be at MMI and opined that, while claimant has a history of previous carpal tunnel symptomatology on the left, there is no documentation to support previous permanent impairment. He went on to assign a 10 percent left upper extremity impairment for residuals of entrapment neuropathy at the left wrist and a 5 percent left upper extremity impairment for residuals of left medial epicondylitis. He combined the impairments for a 15 percent left upper extremity impairment. All impairments are pursuant to the *AMA Guides*, 4<sup>th</sup> ed. Dr. Bieri found claimant's impairments attributable to the November 1, 2009, injury. Dr. Bieri concluded claimant's additional subjective complaints failed to meet the criteria for additional permanent impairment.

Dr. Bieri noted claimant's subjective complaints of pain radiating into the neck. However, both claimant's history and the medical documentation failed to support a specific injury involving the cervical spine region. He found claimant's pain to be referred in nature and claimant failed to meet the criteria for any permanent impairment of the cervicothoracic spine as a result of the injury.

Dr. Bieri limited claimant's repetitive gripping and grasping with the left upper extremity to no more than occasionally to frequently. He also wrote that true cumulative trauma disorder may disqualify claimant from any work involving repetitive use of the upper extremities of significant intensity and duration.

After the evaluation by Dr. Bieri, claimant's attorney, Ms. Franklin, withdrew and then claimant filed a new claim, Pro Se, in Docket No. 1,060,057, in March 2012. This claim alleged a date of accident of November 9, 2009, and involves the shoulders, elbows and neck, the same areas of the body as Docket No. 1,051,048.

Claimant testified that her neck and shoulders have been an issue since November 1, 2009, but were ignored by the doctors and her now former attorney, Joni Franklin. Claimant has been unable to find employment because of her injuries.

Claimant was involved in an altercation at the office of the Clerk of the United States District Court for the District of Kansas when she attempted to file certain papers with the Bankruptcy Court. Claimant testified at the preliminary hearing, that along with her workers compensation claims, she also had a possible EEOC claim against respondent, as the result of her termination on October 13, 2011. The exact nature of the papers claimant attempted to file with the bankruptcy clerk were never identified in this record. At some point, while trying to file those unidentified papers, claimant became upset with the clerks in the bankruptcy office and became verbally abusive. The United States Marshal's office was called and claimant then had a physical altercation with two Deputy United States Marshals. This altercation resulted in the filing of a Criminal Complaint against claimant on February 28, 2012. Claimant testified that during the altercation and subsequent arrest, her neck and shoulders were injured, but she contends they were initially injured in November 2009.

Claimant had a radiograph of the cervical spine on February 1, 2012, which revealed mild degenerative bone and disk disease. Claimant had a CT scan of her head and cervical spine on February 29, 2012, which revealed mild degenerative changes of the cervical spine.

Jonathan Voegeli entered his appearance on claimant's behalf in Docket No. 1,051,048 and handled the regular hearing and the depositions of Dr. Do and Dr. Murati before withdrawing on February 24, 2015. He filed a lien for attorney fees, as had Ms. Franklin earlier.

A motion hearing was held on March 3, 2015, at which time, claimant officially became Pro Se in both her claims and both parties agreed to start the claim over. Claimant was given additional time to find another attorney or proceed Pro Se presenting any additional evidence she wanted to. Should claimant fail to do either of those things, the ALJ indicated he would decide the claims on the information available to him. The ALJ then issued his Award on September 18, 2015.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>2</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>3</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>4</sup>

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.<sup>5</sup>

Respondent contests the determination by the ALJ that claimant suffered a new series of injuries with an accident date of November 9, 2009. Respondent contends the left upper extremity problems developed by claimant stem from a series of injuries

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<sup>2</sup> K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

<sup>3</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>4</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>5</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

developed well before, with an injury date of July 22, 2005. Respondent contends claimant's new problems are a natural consequence of that earlier medical problem.

Dr. Do treated claimant after both series of injuries, performing surgery in both instances. He did indicate some connection between claimant's 2009 symptoms and the original series in 2005. However, he also found a direct connection between claimant's 2009 problems and claimant's job duties with respondent after her return to work post 2005. He opined that whether claimant had the surgery in 2005 or not, she could have just as easily developed the upper extremity problems from her current job duties.

Dr. Murati also found claimant's current symptoms related to the 2009 series rather than the earlier accident. Finally, Dr. Bieri determined claimant's current injuries occurred during the course of active employment and repetitive activity as reported up to November 1, 2009. The Board finds claimant suffered a series of repetitive trauma through November 9, 2009, while working for respondent. The Award of the ALJ is affirmed on this issue.

Claimant contends she suffered injuries to her neck and left shoulder while working for respondent. However, in neither Dr. Do's medical records, nor in the physical therapy records was there mention of either claimant's neck or shoulder complaints. The Board finds claimant has not satisfied her burden of proving injury to either her left shoulder or cervical spine. The denial of benefits for those areas of the body by the ALJ is affirmed.

The award of a 15 percent functional impairment to claimant's left upper extremity, based upon the rating provided by Dr. Bieri, is supported by this record and is adopted by the Board. The Board finds Dr. Bieri's opinion more persuasive than that of Dr. Murati. Respondent contends entitlement to a reduction based upon claimant's preexisting left upper extremity impairment from her earlier award. However, Dr. Bieri's rating is specifically attributable to the 2009 series of traumas and not claimant's preexisting condition. Therefore, no credit for a preexisting impairment is awarded.

With regard to claimant's need for and entitlement to future medical treatment for these injuries, and claimant's second claim in Docket No. 1,060,057, the Board adopts the findings and conclusions of the ALJ in the Award.

At the oral argument to the Board, claimant raised numerous issues dealing with the filing of EEOC claims, disputes with the clerk of the U.S. Bankruptcy Court, claimant's arrest by U.S. Marshals, her subsequent incarceration, whether that arrest constituted an illegal kidnapping of claimant and the involvement of the CIA. Those are not issues over which the Board has jurisdiction and will not be addressed in this Order. Claimant's objection to the Board's consideration of the medical depositions in this matter because she was not present at the taking of those depositions is overruled. Claimant was represented by counsel at every medical deposition taken in this matter. Those depositions have been properly considered as part of this record. The ALJ noted



claimant's award is subject to the two attorney liens filed in this matter. The Board affirms that decision.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has satisfied her burden of proving she suffered a series of traumas through November 9, 2009, while working for respondent, resulting in a 15 percent functional impairment to her left upper extremity. Respondent has failed to prove entitlement to a credit for a preexisting functional impairment

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated September 18, 2015, is affirmed insofar as it does not conflict with the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2016.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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